PUBLIC PROSECUTOR

v.

HEM SULONG & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 14 OF 1985]
6 MARCH 1990

EVIDENCE: *Requirements for invoking s. 27 of the Evidence Act - Trafficking - Charged with common intention - Need to examine conduct - Language used should be particularised - Contemporaneous record - Not a strict necessity but is desirable.*

The two accused were charged with trafficking in dangerous drugs with common intention. The prosecution sought to rely on s. 27 of the Evidence Act to connect the two accused with the discovery of three sacks of cannabis on top of a hill.

Held:

[1] In a charge for trafficking with common intention, it was necessary to examine the conduct of each of the accused persons, to make a finding of common intention.

[2] In order to invoke s. 27 of the Evidence Act, the following conditions must be satisfied:

(i) the statements made by the accused must be particularised.

(ii) the accused making the statements should be identified.

(iii) it should be established when the statements were made.

[3] There is insufficient evidence connecting the two accused with the 3 sacks of cannabis and therefore there is no *prima facie* case against them.

[Both accused acquitted and discharged.]

Case referred to:
Sum Kum Seng v. PP [1981] 1 MLJ 244

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 27

For the prosecution - Tun Abdul Majid bin Tun Hamzah, Deputy Public Prosecutor
For the first accused - Manjit Singh; M/s. Manjit Singh & Co.
For the second accused - Ranjit Singh; M/s. Ranjit Singh

JUDGMENT

KC Vohrah J:

The two accused are charged as follows:

> That you jointly on 14 October 1984 at about 6.15a.m. at Pantai Telok Amboi, Kota Kuala Muda, in the State of Kedah Darulaman, in furtherance of the common intention of you both, did on your own behalf, traffic in dangerous drugs to wit, cannabis weighing 58.892 kilograms and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code.

The evidence shows that on 13 October 1984, a boat was found high and dry on the rocks off the shore of Pantai Telok Amboi. The police recovered the boat and three sacks of what were believed to be cannabis lying near the boat. These three sacks were never produced in Court and there was no evidence as to what they actually contained. The Government Chemist, PW1, who examined the boat said that he found traces of cannabis in the hold of the boat.

On the same day, 13 October 1984, the first accused was arrested at the Kota Kuala Muda bus station. There was evidence that the first accused met with one Osman bin Nyak Muhamad, PW4, the morning of 17 October 1984, at the village of Pantai Telok Amboi where the first accused asked the witness PW4 to change some money for him. PW4 gave him RM10 in exchange for Thai currency, 100 bhats. Said bin Mahim, PW5, then gave the first accused a pair of trousers and PW4 then requested his son PW6 to send the first accused to Kota Kuala Muda bus station which his son did.

As for the second accused the evidence was that he was arrested separately at Kampong Tepi Sungai on 17 October 1984 by the men of ex-ASP Dass.

Ex-Asp Dass said in regard to these two accused that "they" told him that there were some more ganja hidden on top of the hill. At first he said this was on 14 October 1984 but later under cross-examination it appeared the two told him that, on 13 October 1984.

It will be noticed that the witness did not state which of the two said what. There was no particularity in the language used. No contemporaneous record of what was actually said was produced in Court although I am aware there is no strict necessity for it (see *Sum Kum Seng v. PP* [1981] 1 MLJ 244) but it is desirable. In this case it would have helped resolve who said what and when. It is necessary to know this since the charge against both of them is a charge for trafficking in cannabis with common intention and it is necessary to examine the conduct of each of the two accused to make a finding of common intention, and the evidence as to who led the police to the discovery of the three sacks is far from satisfactory.

I have grave doubts to what actually transpired on the hill. Ex-ACP Nelson Dass said that the two accused led the police party through some bushes and undergrowth and that they pointed out, first, one sack and then, some 15 to 20 yards away, two other sacks. These were the sacks which the Government Chemist said contained 58.92 kilograms of cannabis.

Now ex-ASP Dass started that "they" pointed out the sacks and his evidence was that each accused, separately, had his hands cuffed to the back when they were at the scene. How then did each accused point out the sacks? The evidence of retired Sergeant Omar, however, was that both accused were handcuffed to each other and that ex-ASP Dass took them both to the bushes. While at first retired Sergeant Omar said that the two accused showed Ex-ASP Dass "the things" he, later, under cross-examination by Counsel for first accused, said he could not remember if the first accused showed "the things" and still later, under re-examination, he said he could not remember who pointed out "the things". In his evidence he said he was behind Ex-ASP Dass in the bushes. But strangely his evidence was that he did not see the "things" i.e., the three sacks. How could he then have witnessed one of the accused showing the "things"?

Did the two accused really point out the three sacks or there was a search after which the police party discovered the sacks? The point is, according to retired Sergeant Omar, the police spent 1½ hours in the area, from the time they arrived at the area up to the time they left the area, and during that time he did not see anything there. Why were 1½ hours needed in the

area if the evidence is that two accused did lead the police to the discovery of the three sacks there? On the other hand how does one reconcile the evidence of retired Sergeant Omar who said he was positive he did not see anything there with the rest of the evidence relating to the discovery of the three sacks? The evidence of discovery adduced by the prosecution to my mind is most unreliable.

Both accused are charged with trafficking with common intention and there must be acts or omissions on their separate parts for the Court to infer joint intention. There is no evidence to even show that both knew each other or that they had any connection with the boat. What is not disputed is they went to the hill at Pantai Telok Amboi on 14 October 1984 together in the company of the police. The police brought them there. The rest of the unsatisfactory prosecution evidence does not indicate which one of them was the one to show the sacks if indeed anyone did show the sacks. The allegation that one of them did point out the sacks and it is not known who did so - that allegation even if true without further evidence relating to common intention - cannot implicate the other accused. Not knowing who said what and when and the identity of the person responsible for the discovery being in doubt s. 27 of the Evidence Act cannot be invoked.

I hold there is insufficient evidence connecting the two accused with the three sacks of cannabis under the charge and therefore no *prima facie* case has been made against both of them. In the circumstances the two accused are acquitted and discharged.

Also found at [1990] 1 CLJ 1188